

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suede G. Kelly.

Pacific Gas and Electric Company

Project No. 77-127

ORDER DENYING MOTION TO REOPEN RECORD

(Issued November 23, 2004)

1. Friends of the Eel River (Friends) has filed a motion requesting the Commission to reopen the administrative record of proceedings involving how Pacific Gas and Electric Company (PG&E) must operate its Potter Valley Project No. 77 to protect federally-listed salmonids. As discussed below, we deny the motion. This order is in the public interest because it promotes finality of Commission action.

**Background**

2. The history of this proceeding is explained in orders issued herein on January 28, June 2, and September 21, 2004.<sup>1</sup> In brief, these orders concern how Pacific Gas and Electric Company's (PG&E) Potter Valley Project No. 77 should be operated in order to protect federally-listed threatened salmonids in the Eel River, on which the Potter Valley Project is located. The January 28 order amended the Potter Valley license to require changes in project facilities and operations for that purpose. The June 2 Order, among other things, denied the requests of Friends and others for rehearing. The September 21 Order denied Friends request for rehearing or reconsideration of the June 2 Order.

3. On August 5, 2004, Friends filed a petition for judicial review of the January 28 and June 2 Orders in the United States Court of Appeals for the Ninth Circuit (No. 04-73862).

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<sup>1</sup> 106 FERC ¶ 61,065 (January 28 Order); 107 FERC ¶ 61,232 (June 2 Order); and 108 FERC ¶ 61,266 (September 21 Order).

4. On October 14, 2004, Friends filed a motion to reopen the administrative record in order to include (1) aerial photographs of the Eel River below the lowermost project feature (Cape Horn Dam) taken by a member of Friends in August and September and (2) the decision in *Natural Resources Defense Council v. Patterson*, No. Civ. S-88-1658 LKK (E.D. Cal., August 27, 2004) (*NRDC v. Patterson*).

### **Discussion**

5. Friends states that the aerial photographs show that under the flow regime required by the June 2 Order, large sections of the Eel River are dry or polluted and therefore unable to support salmonids and other aquatic species. It states that *NRDC v. Patterson* holds that the Commission and PG&E are liable for violation of state and federal laws requiring dam operators to reestablish and maintain historic fisheries. Friends contends that the photographs and *NRDC v. Patterson* should be included in the administrative record because they support Friends' position that additional structural or operational measures are needed to protect the threatened salmon.

6. We will deny Friends' motion. None of the photographs show the Eel River to be dewatered, although it is evident that flows were low when the photographs were taken. This is to be expected, as August and September are naturally low flow periods in this river basin. The project's flow regime, which was established pursuant to the Biological Opinion and the Reasonable and Prudent Alternative filed by the National Marine Fisheries Service (NOAA Fisheries) to protect the threatened salmonids, recognizes this. It requires releases to the Eel River from Cape Horn Dam during August and September ranging from three to 35 cubic feet per second (cfs), depending on cumulative inflows to Lake Pillsbury upstream in the current and prior years.<sup>2</sup> This allows for within-year and between-year flow variability which, during wetter years, provides incremental improvement to potential biological productivity of the salmonids.<sup>3</sup> The photographs by themselves do not demonstrate either that PG&E is not meeting the requirements of its license, or that the water is polluted. In fact, the flow release gage at Cape Horn Dam shows that PG&E was releasing 15 cfs on the dates the photographs were taken, in compliance with the requirements of NOAA Fisheries' Biological Opinion.<sup>4</sup>

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<sup>2</sup> 106 FERC at 61,222.

<sup>3</sup> See Biological Opinion at 96.

<sup>4</sup> On October 26, 2004, as requested by Commission staff during the course of a regularly scheduled environmental inspection, PG&E filed certified flow release records for the project for the period from October 1, 2003 to September 21, 2004, which encompass the days when the photographs were taken. These records show that PG&E was releasing 15 cfs on the dates in question.

7. This Commission and the courts can take official notice of any judicial decision at any time, so there is no need to reopen the record for this purpose. In any event, we fail to see the relevance of *NRDC v. Patterson* to this proceeding. It holds that the operation of Friant Dam in California by the U.S. Department of the Interior's Bureau of Reclamation violates section 5937 of the California Fish and Game Code<sup>5</sup> as applied to it by virtue of section 8 of the Reclamation Act of 1902.<sup>6</sup> The Reclamation Act has no bearing on the operation of the non-federal projects licensed by this Commission.

The Commission orders:

Friends of the Eel River's request to reopen the administrative record in this proceeding, filed on October 14, 2004, is denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>5</sup> California Fish and Game Code § 5937.

<sup>6</sup> 43 U.S.C. § 383.